Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASS'N, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASS'NS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASS'N, INC., NATIONAL ASS'N OF COLLEGE STORES, INC., BOOKS UNLIMITED, INC., and AMPERSAND BOOKS,
Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

APPELLEES' MOTION TO AFFIRM OR DISMISS

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Selected Provisions of the Code of Virginia*

§ 18.2-391. "Unlawful acts. — (a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse*:

> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles."

§ 18.2-390(1) " 'Juvenile' means a person less than eighteen years of age."

§ 18.2-390(6) " 'Harmful to Juveniles' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles."

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* The italicized provision is the 1985 Amendment at issue in this action.

MOTION AND SUMMARY OF ARGUMENT

The district court and a unanimous panel of the Fourth Circuit have found that the 1985 amendment to Code of Virginia § 18.2-391 (the "Amendment") "discourages the exercise of first amendment rights in a real and substantial fashion" and thus is unconstitutionally overbroad. 802 F.2d at 696.

The Amendment bars any general retail bookstore or newsstand from displaying any book or magazine that could be "harmful" to a hypothetical minor of any age who *could* examine the work. The Amendment thereby restricts access of both adults and older juveniles to material which is not obscene as to them, but which may be "harmful" to the youngest juvenile.[1] The vast overbreadth of the Amendment is most starkly evinced by the Virginia Attorney General's concession before the Fourth Circuit that, under the Amendment, any general retail bookseller who displays *Hollywood Wives* by Jackie Collins, a national bestseller for over six months, on his business premises has committed a misdemeanor. The display of this and other bestselling novels is a crime under the Amendment because a hypothetical nine-year-old for whom the work is "harmful" *may* examine and peruse it.

In contrast to the two city ordinances that have been upheld in two other circuits, the Amendment is not limited to prohibiting minors from actually perusing "harmful" materials or having "harmful" materials thrust before their view. Thus no conflict among the circuits is presented.

The appellees move to dismiss the appeal and affirm the judgment below on the grounds that the rulings below are constitutionally correct and this appeal presents no substantial federal question for review.

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[1] Two of the three prongs of the definition of "harmful to juveniles" do not even require that the work be "taken as a whole." *See* Code of Virginia § 18.2-390(6).

STATEMENT OF THE CASE

On July 1, 1985, the Amendment was enacted making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" material deemed "harmful to juveniles." Virginia Code § 18.2-391. The district court found "the plain language of the [Amendment] . . . restricts the *display* of the proscribed materials, not simply their perusal." 617 F. Supp. at 706 (emphasis in original). The central issue determined by the district court and unanimously affirmed by the Fourth Circuit is that the Amendment is "not reasonably restricted to the evil with which it is said to deal." 617 F. Supp. at 705, quoting *Butler v. Michigan*, 352 U.S. 380 (1957).

The district court explicitly noted that Virginia's stated purpose of promoting the well-being of juveniles could more directly and more narrowly be satisfied by "a law simply forbidding the actual perusal by minors of these harmful materials." 617 F. Supp. at 707.

> "The level of discourse reaching commercial bookshelves cannot be limited to what might be appropriate for an elementary school library. The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain 'harmful' materials, the unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials. This, in turn, severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible."

617 F. Supp. at 705-6 (citations omitted).

Finding the Amendment's restrictions to be "far broader than necessary," the district court held the Amendment to be "facially invalid for overbreadth . . . [which] cannot be saved by any narrowing construction." 617 F. Supp. at 706-7. The Amendment was permanently enjoined from being enforced. Before both the district court and the Fourth Circuit, the Virginia Attorney General suggested that the courts could rewrite the Amendment to narrow the prohibition on display. The Attorney General thereby conceded that the Amendment as enacted is unconstitutionally overbroad. A unanimous panel of the Fourth Circuit held that "the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an overbreadth challenge." 802 F.2d at 696. The Fourth Circuit accordingly affirmed the district court's judgment declaring the Amendment unconstitutional and enjoining its enforcement.

THE APPELLEES

The appellees publish, produce, distribute and sell books, magazines, and other printed and visual materials of all types.

The American Booksellers Association, Inc. is the major national association of booksellers in the United States. It has approximately 4,000 members, which include more than 7,000 book stores. Its members account for more than 80% of all sales of books of general interest by book stores.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations.

The Council for Periodical Distributors Associations is the national trade association for over four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,600 college and university bookstores located throughout the United States, representing over 95% of the higher education retail market for books.

Books Unlimited, Inc. is a general retail bookstore located at 2729 Wilson Boulevard, Arlington, Virginia.

Ampersand Books is a general retail bookstore located at 118 King Street, Alexandria, Virginia.

ARGUMENT

THE AMENDMENT UNCONSTITUTIONALLY RESTRICTS THE ACCESS OF ADULTS AND OLDER JUVENILES TO FIRST AMENDMENT PROTECTED MATERIALS

The jurisdictional statement is entirely premised upon the suggestion that there is no difference for purposes of First Amendment analysis between restrictions on the sale of books to minors for whom the books are "harmful," and restrictions on the display of such books to the entire general reading public. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court held that the First Amendment does not prohibit a state from regulating the *sale* to a minor of material that is found to be obscene as to that minor. The holding in *Ginsberg* is not at issue in this appeal; the Amendment prohibits the general retail *display*, to all adults and all juveniles, of any material that is "harmful" to any juvenile.

Restrictions on display have a vastly broader impact on First Amendment rights than do restrictions on sales. Prohibiting the sale of a work to a particular minor as to whom the work is obscene does not affect the First Amendment rights of anyone as to whom the work is not obscene. Prohibitions on display, on the other hand, restrict the access of all readers to any material which is obscene as to the youngest reader. The district court found, based on uncontroverted testimony, that this restriction on access "severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible." 617 F. Supp. at 706. The rationale of *Ginsberg v. New York* that supported a variable test of obscenity for *sales* to minors cannot justify restrictions on *display* to minors, since such restrictions also constitute restrictions on display to adults and older juveniles of books that, as to them, are First Amendment protected. The district court specifically found that display of books is a critical factor in their sale.

> "In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content."

617 F. Supp. at 702.

The Amendment criminalizes the mere display — the mere presence — of certain words or pictures. Under the Amendment, the mere availability of "harmful" words or pictures on general retail business premises is illegal, if any juvenile *could* have access to such words and pictures.

Under the Amendment, it is the "display"[2] that is the crime. It is not necessary for a juvenile actually to enter a book store before a book store owner or clerk may be arrested for violating the Amendment. It is not necessary for a juvenile actually to "examine or peruse" certain words or pictures before a book store owner or clerk may be arrested. The elements of the crime are simply that (1) one knowingly displays for commercial purpose, (2) words or pictures deemed "harmful" to any juvenile, (3) in a place where it is possible that juveniles "may" examine or peruse them.

Any work that is harmful to a juvenile of *any* age cannot be displayed in a general retail book store. The Amendment prohibits a bookseller from making the reasonable distinction as to whether a particular work may be "harmful" to a

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[2] "Display" under the Amendment is not even limited to harmful material that is thrust into the view of juveniles, but rather includes any work that is located where a juvenile "*may*" examine and peruse it, even if no "harmful" material is thrust into a juvenile's view.

nine-year-old but not "harmful" to a seventeen-year-old.[3] The Amendment thus irrebuttably presumes that whatever is "harmful" for a nine-year-old may be justifiably proscribed as to a seventeen-year-old college student.

As the Virginia Attorney General conceded before the Fourth Circuit, under the Amendment, any general retail bookseller who displays the national bestseller *Hollywood Wives* by Jackie Collins[4] on his business premises has committed a misdemeanor.

It is well-settled that a regulation affecting First Amendment rights "must be narrowly tailored to further the State's legitimate interests." *Grayned v. Rockford*, 408 U.S. 104, 116-17 (1972). *See also Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689-90 (1968). The uncontroverted trial testimony of two local Virginia booksellers and a representative of a national publisher demonstrated that the Amendment effectively prohibits the display in general retail premises of First Amendment protected materials that are not obscene as to adults and older juveniles. Since the Amendment prohibits the display of *all* works that are deemed harmful to a juvenile of *any* age, adults and older juveniles browsing in any general retail bookstore are reduced to viewing only those works that are suitable for the most susceptible young child, a result that is unconstitutional under the Court's ruling in *Butler v. Michigan*, 352 U.S. 380 (1957). State statutes similar to the Amendment have been held unconstitutional on such grounds. *See Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986); *American Booksellers Ass'n*

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[3] The Fourth Circuit noted that "[w]hile the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application." 802 F.2d at 695 n.7. This is yet another reason why variable obscenity principles are inapplicable to display restrictions.

[4] *Hollywood Wives* was on the New York Times Best Seller List for over six months beginning with the week of August 7, 1983.

v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) ("[A]n examination of the Act reveals that it infringes on the protected rights of adults. The language includes a public display prohibition which necessarily prevents perusal by, and limits sales to, adults.").

The Virginia Attorney General attempts to rely upon Eighth Circuit and Tenth Circuit opinions that were distinguished and criticized by the Fourth Circuit. Unlike the Amendment, the city ordinances at issue in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), and *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985), did not flatly prohibit general retail book stores from displaying all works that could be harmful to any juvenile. In *M.S. News* and *Upper Midwest*, the ordinances permitted such materials to be freely available in any general retail book store so long as no material that is "harmful to juveniles" was involuntarily thrust into the view of juveniles. While the Amendment criminalizes the mere "display" of materials without regard to whether a juvenile views such materials, the ordinances in *M.S. News* and *Upper Midwest* only prevented the harmful aspects of materials from being thrust into the view of a minor.[5]

The Amendment prohibits all "display" of materials where juveniles "may" examine and peruse them, and thereby effectively bars the "display" of all such materials to any adult as well. Permitting Virginia booksellers to display only materials suitable for a nine-year-old may insure that no juvenile will peruse "harmful" materials. The First Amendment, however, has never been interpreted to permit such a Draconian prohibition.

The Virginia Attorney General effectively concedes that *M.S. News* and *Upper Midwest* do not support the Amendment by repeatedly suggesting that the courts rewrite the Amendment

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[5] In contrast to the record in this case, *M.S. News* and *Upper Midwest* were decided without the benefit of hearing testimony regarding the actual limiting impact of display provisions on the distribution of books and periodicals.

so that it, like the ordinances at issue in *M.S. News* and *Upper Midwest*, only prohibits the thrusting of "harmful" materials into the view of minors. The Attorney General suggests that all material may be displayed so long as any "harmful" material is placed in blinder racks or adult only racks, or if "harmful" material is identified with "color-coded" tags.[6] Jurisdictional Statement at 9-10. The courts below have properly rejected these suggestions as being diametrically opposed to the plain language and clear intent of the Amendment.

> "The Attorney General suggests that a bookseller may comply with the amendment by simply placing tags on the prescribed books, or by placing them on special 'adult only' racks. The interpretation completely ignores the plain language of the new law, which restricts the *display* of the proscribed materials, not simply their perusal. If the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is 'on display' where the juvenile 'may' examine it even if the item is tagged. Indeed, since the material may well have pictures or passages 'harmful to minors' on its front or back cover, the law is violated if a person under the age of 18 can simply see it. The amendment makes no provision for tags, adults only racks or blinder racks."

617 F. Supp. at 706 (emphasis in original).

> "Placing 'adults only' tags on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials.

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[6] It should be noted that the use of "color-coded tags" as suggested by the Attorney General would prevent neither the actual perusal of harmful materials by a juvenile nor the thrusting of harmful materials before the view of a juvenile.

> The [Amendment] requires that such materials not be displayed so that minors *may* have access to them."

802 F.2d at 696 (emphasis in original).

The Amendment as enacted effectively prohibits free access by adults and older juveniles to any work that is not appropriate for a nine-year-old. The lower courts properly concluded that this blanket prohibition on display impedes the exercise of First Amendment rights in a real and substantial fashion that is clearly overbroad. No precedent of this Court supports the blunderbuss prohibition of the Amendment.[7]

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[7] Appendix L to the Jurisdictional Statement cites a number of state statutes which appellant suggests have some relevance to this action. Two of these statutes have been held unconstitutional. *See Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (holding 8 C.R.S. §§ 18-7-502(5) and 18-7-503 unconstitutional); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986) (holding O.C.G.A. §§ 16-12-103 (e) and 16-12-104 unconstitutional). Most of the cited statutes, like the ordinances in *M.S. Casado* and *Upper Midwest*, are limited to preventing the involuntary exposure of juveniles to harmful material or preventing any person from intentionally displaying harmful materials to a specific known minor. *See* Del. Code Ann. Tit. 11, § 1365 (1979); La. Rev. Stat. Ann. § 14:91.11 (Supp. 1984); Me. Rev. Stat. Ann. Tit. 17, § 2911 (1983 & Supp. 1983-84); Mo. Ann. Stat. § 573.060 (Vernon 1979); Mont. Code Ann. § 45-8-202 (1983); Neb. Rev. Stat. § 28-808 (1979); N.J. Stat. Ann. § 2C:34-4 (West 1982); N.C. Gen. Stat. § 14-190.14 (Supp. 1985); S.C. Ann. §§ 16-15-290,-390 (Supp. 1983); S.D. Codified Laws Ann. § 22-24-29.1 (1979); Tex. Penal Code Ann. § 43.24 (1974); Vt. Stat. Ann. Tit. 13 § 2804b (Supp. 1983); W. Va. Code § 61-8A-2. The remaining cited statutes represent the diverse approaches of different states – diverse approaches that are not at issue in the instant appeal.

CONCLUSION

The Amendment broadly restricts the First Amendment rights of adults and older juveniles. The Appellant cites no authority, and the lower courts found no authority, to support the vast sweep of the Amendment's prohibition. There is no such authority. Moreover, the decision below creates no conflict among the federal courts of appeals. This appeal accordingly raises no substantial question that would warrant this Court's review, and therefore the appeal should be dismissed or the judgment below should be summarily affirmed.

Respectfully submitted,

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